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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 493

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,
Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,
Respondents.

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Opinion of Court Below

The majority opinion of the Tenth Circuit Court of Appeals appears at pages 557-568 of the Record. Circuit Judge Bratton, in the majority opinion, so clearly, con-

cisely and intelligently disposes of the issues herein that we refer to it here as a preliminary statement of the case.

The Matter Involved

The Denver and Rio Grande Western Railroad Company closed a public street in Provo City, Utah, barricaded the same with fences, and placed across it several new tracks. All of this was done in plain contravention, of at least *three* Utah statutes, and of two decisions of the Supreme Court of Utah, namely:

> Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406, (1941)
>
> Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221, (February 14, 1946)

These three statutes and the foregoing two cases, under the doctrine of Erie Railroad Co. v. Tompkins, 304, U. S. 64; Ruhlin v. New York Life Insurance Co., 304 U. S. 202; are controlling here.

I.

The complete and short answer to the petition in these cases is that the legislature of Utah changed the applicable statutory law *after* Wall vs. Salt Lake City, the case upon which petitioners rely, arose.

Petitioners rely *solely* upon the decision of the Supreme Court of Utah in Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766. The action of the municipal corporation which was complained of in that case occurred between the years 1891 and 1912. The acts which were held to vacate the street in that case were done during the years 1891 and 1912.

The evolution of the statute in question is outlined in the case of Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941).

We reprint here the evolution of the applicable statute as outlined by the Supreme Court of Utah in that case because the court lays special emphasis upon the changes made by the legislature *after* Wall vs. Salt Lake City. The italics are the court's.

"In the Compiled Laws of Utah, 1888, Sec. 1755, it is provided:

" 'The city council shall have the following powers:• • •

" '8. *To lay out,* establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds *and vacate* the same.' "

"The same provision will be found in the Revised Statutes of Utah, 1898; except for the insertion of a semi-colon between the words 'grounds' and 'and', also in Laws of Utah, 1901, c. 124, 1903, c. 138, 1905, c. 42, Compiled Laws of Utah 1907, §206, subd. 8, and Laws of Utah, 1911, c. 120. There was added in 1915, Laws of Utah 1915, Chap. 100, the following to the above set forth provision: '206x8. *To lay out,* establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds; *and to vacate* the same; and to establish, maintain and to provide for the supervision of public playgrounds, recreation places and swimming pools.' "

"In Chap. 123, Laws of Utah 1917, Sec. 206x8, was amended to read as follows: '206x8. *To lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks and public grounds, *and to vacate* streets, alleys, avenues and boulevards or parts thereof, *by ordinance;* and to establish, maintain and provide for the supervision of bath houses, public playgrounds, recreation places and swimming pools.' (Italics added.)"

"The same provision is to be found in the Compiled Laws of Utah 1917, §570x8. In the Laws of Utah 1919, c. 11, this section was amended to read: '*To lay out,* establish, open, alter, widen, narrow, extend, grade, pave,

or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks and public grounds *and to vacate* streets, alleys, avenues, parks and boulevards or parts thereof, *by ordinance;* and to establish, maintain and provide for the supervision of bath houses, public playgrounds, recreation places, and swimming pools.' (Italics added.)"

"The Revised Statutes of Utah 1933, provide:

" '15-8-1. The boards of commissioners and city councils of cities shall have the power to control the finances and property of the corporation.
* * *

" '15-8-8. *They may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate* the same or parts thereof, *by ordinance.*' (Italics added.)"

"It will be noted that first the power was given to 'lay out * * * and vacate'; then the power was given to 'lay out * * * and to vacate * * *, by ordinance', and now there is the present power that the council 'may lay out * * * and * * * vacate * * * by ordinance.' "

At all times important to the decision of the Supreme Court of Utah in Wall v. Salt Lake City, above, upon which petitioner relies, the controlling statute gave to the city the power to "lay out * * * and vacate" streets. There was no requirement in the statute that the street be vacated *"by ordinance"*.

In 1917, however, the statute was amended and since that time the power conferred upon the city by the legislature is limited. It is the power only to vacate streets "by ordinance".

In the cases herein under consideration the applicable statute is Utah Code Annotated 1943, Section 15-8-8. The legislature therein defines the power of cities to vacate streets, as follows:

"They (cities and towns) *may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise

improve *streets,* alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate the same* or parts thereof, *by ordinance.*"

Not only has the applicable statute been amended since Wall vs. Salt Lake City, but moreover the Supreme Court of Utah has construed that statute in Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941). That decision is controlling here. The majority of the Tenth Circuit Court of Appeals so holds. In that case, the city of Tooele sued Elkington to quiet title in the city to an alley. Tooele City, a municipal corporation, by its Mayor conveyed the alley property to Elkington and the deed recited;

"This deed is executed under and by virtue of a resolution of the city council of Tooele City, Utah, duly adopted on the 7th day of March, A. D. 1938."

There was no dispute that the deed was executed pursuant to a *resolution* of the city council of Tooele City. No ordinance was enacted by the city council. The Utah statute provided then, as now, as follows:

"They (cities and towns) *may lay out,* establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve *streets,* alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, *and may vacate the same* or parts thereof, *by ordinance.*"

The Supreme Court of Utah held that there was no ground for any estoppel *in pais* against the city of Tooele. The Supreme Court said: "The community is interested in the vacating of streets and the legislature has provided that they be vacated by ordinance, in order that the community may have notice of the acts of the commissions and thereby protect the private property holder and the community against such actions."

The judgment of the lower court quieting title to the alley in the city was affirmed.

II.

The Supreme Court of Utah in Tooele City vs. Elkington, the case which *is* controlling here, pointed to the provision of the statute that streets may be vacated *by ordinance* and said in sweeping language that the powers of municipal corporations are delegated; that municipal corporations may exercise only the powers granted to them; and that such powers can be exercised only in the manner prescribed.

The language of the court follows:

"The powers of municipal corporations are delegated and a municipal corporation may exercise only the powers granted and in the manner prescribed. The question is whether the statute is directory or mandatory."

The Supreme Court of Utah held in Tooele City vs. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941), that a city cannot vacate a street *except by ordinance.* The Supreme Court held that the city was not estopped, *even though the city council had adopted a resolution and the Mayor, pursuant thereto had executed a deed* to the property in question to Elkington. The city authorities had gone much further in that case than the city authorities of Provo have in this. In the Elkington case the city council had formally adopted a resolution and pursuant thereto the Mayor had executed and delivered a *deed* to the property in question. Provo City in this case took no such action. At most the matter was in the negotiation or parley stage. Everyone concerned understood that an ordinance was necessary all through the negotiations and the railroad attorneys had submitted a proposed ordinance. No ordinance was ever enacted and no other formal action was ever taken by the Provo City Commission. The record in this case shows that all that took place was conversation between the railroad and the Provo City Officials. Those conversations disclose no definite verbal commitments, but, on the contrary, a wide difference of opinion as to the conditions which the city would require before an ordinance was enacted, and at most indefinite,

qualified and equivocal statements on the part of the Mayor.

The recent decision of the Supreme Court of Utah in Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221, (Feb. 14, 1946), confirms the decision of the Utah Supreme Court in Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2d) 406. Hall vs. North Ogden City was an action to enjoin the city from opening up as streets certain tracts of land indicated as streets by the official plat of the townsite. It was argued that the city had lost whatever title it may have had to the streets which were never opened as public thoroughfares or had ceased to be used as streets. But the contention was rejected, and in upholding the right of the city to open the tracts as streets, the court said: (page 225)

"The only way in which North Ogden could have lost title or be barred by estoppel and laches from asserting title, if at all, would be some acts which would either vest title in others or which would give others the right to preclude North Ogden from asserting its title. In view of the unequivocal language of the Townsite Act, title could not be acquired by individuals through adverse user. As stated in the case of Tooele City v. Elkington, 100 Utah 485, 116 P. 2nd 406, although a street or alley designated as such on the townsite plat has not been opened up, the officials of the municipality themselves could not convey the title without compliance with the statutes. the municipality or the public official holding title to It is necessary to find statutory authority for divesting the streets in trust for the town, of such title to the streets, in order for the appellants to prevail in this case. It is not claimed that any ordinance was adopted for vacating the streets in question, nor that the inhabitants of North Ogden ever filed any petition to vacate or alter any portion of the plat of North Ogden. The rule of estoppel, could not apply against the town as to lands charged with a public trust, for the reasons hereinbefore indicated. Any abandonment or vacation of the land for street purposes, to discharge it of the public trust, would have to be in the manner provided by statute."

In Hall v. North Ogden City there were seventy-five years of adverse user against the city and acquiescence by the city all that time in the extension of fence lines to the center of the street and the erection of valuable improvements in the area of the street.

The right of plaintiffs to prevent the city from opening up streets was necessarily involved in the action. It is incorrect to say, as petitioners do in their brief, that what the court said, quoted above, was purely *obiter dictum.*

We believe that no other authorities are necessary to sustain the position of the city of Provo in this matter. We think the law of Utah is clear as set forth in the foregoing statute and as interpreted by the Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 Pacific (2nd) 406 (1941); and Hall v. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221. However, the decision of the Supreme Court of Utah is consistent with the authorities elsewhere.

The law of Utah under our statute and the decisions of the Supreme Court is that a city may not vacate a street except *by ordinance.* It is the law of Utah under the decisions of the Supreme Court in Tooele City v. Elkington and Hall v. North Ogden City that the city may not be estopped to claim that an ordinance is necessary.

III.

The Public Service Commission of the State of Utah has the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of a public road or highway by a railroad, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety.

No track of any railroad shall be constructed across a public road, highway or street at grade without the permission of the Commission having first been secured. (Utah Code Annotated 1943, Section 76-4-15.)

The Denver and Rio Grande Western Railroad Company closed a public street in Provo, barricaded the same, and placed across it several new tracks. All of this was done without the permission of the Public Service Commission. (Exhibit E, R. p. 551). The effect of the judgment and decree of the District Court in this case is to sanction and perpetuate a violation of the Utah statutes. (Utah Code Annotated 1943, Section 76-4-15.)

The doctrine of equitable estoppel cannot be invoked to accomplish the purpose of vacating a public street in contravention of the statutes of Utah giving the Public Service Commission exclusive power to abolish any crossing, and requiring the permission of the commission first to be secured before any railroad shall construct a track across a public road, highway or street at grade. See the authorities supra, Points I and II of this brief.

IV.

The application of the doctrine of equitable estoppel in this case deprives the citizens of Provo of their legal right under Utah statutes to require the ordinance proposed to be passed closing Ninth South Street to be submitted to the voters of the city before it took effect.

Utah Code Annotated 1943, Section 25-10-21, says: "Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect."

The Supreme Court of Utah in Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941), says: "The community is interested in the vacating of streets and the legislature has provided that they be vacated by ordinance, in order that the community may have notice of

the acts of the commissions and thereby protect the private property holder and the community against such actions."

Section 25-10-21 quoted above was enacted by the legislature to enable the citizens of a city to protect themselves against the action of the city commission. Such statute cannot be set aside by the city and railroad officials taking an unlawful method of vacating a street thereby binding the community in violation of statute and without opportunity to prevent such action.

An ordinance vacating a street is legislative in character and could under the foregoing statute be submitted to the electorate. Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480, 122 ALR 756.

If the city officials and the railroad were permitted to vacate a street in the manner claimed possible by petitioners, an easy evasion of the referendum statute is open to them. In this case the closing of Ninth South Street was unpopular. There were protests from the citizens.

(See exhibits 22, R. p. 532; 64, R. pp. 80 and 91; 53, R. p. 535; 54, R. p. 211; 56, R. p. 537; 57, R. p. 539; 58, R. p. 541; 59, R. p. 542; 60, R. p. 543; 61, R. p. 545; 67, R. p. 547; 68, 70 and 71, R. p. 548; 72, R. p. 549; exhibit G, R. pp. 249 and 368-373; and exhibit H, R. p. 552; R. pp. 427-467.)

If the commission had adopted an ordinance vacating the part of the street in question, the voters of the city would have had the right under this statute to cause the ordinance to be submitted to a vote of the people before it became effective and to defeat it if the requisite vote were cast against it. Cf. Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480. But under the procedure adopted by the city commission in this instance the people were deprived of that right, without any warrant in law. It is suggested that the matter might have been submitted to a referendum, even without passage of an ordinance. But a critical reading of the statute lends no support to that

contention. The statute is limited in scope and effect to the initiation of legislation and to the rejection of laws or ordinances passed by the law-making body. Here no law or ordinance was enacted. There was nothing to submit to the people for approval or rejection before it became effective, within the meaning of the statute. And certainly it was never contemplated that a city commission could by the procedure followed in this instance circumvent the statute and deprive the people of their right expressly granted by the statute to approve or reject the proposed abandonment of a portion of the street which was in active use as a public thoroughfare.

V.

Under the facts and circumstances of this case there is no equitable estoppel against Provo City, a municipal corporation, nor against the citizens and residents of Provo City. Material Findings are clearly erroneous within the meaning of Rule 52.

Should this honorable court conclude that the foregoing three Utah statutes and two Utah decisions are not sufficient reasons upon which to deny certiorari herein, we then respectfully suggest to your honors that, in any event, there is no basis in fact in this case upon which an equitable estoppel can be invoked.

We most certainly do *not* agree with petitioners that there is no dispute as to the facts involved. We most strongly contend that petitioners are in error when they assert (at page 3 of their petition) that,

"The findings of the trial court are supported by substantial evidence, are not clearly erroneous and are recognized by the majority and dissent as binding upon the Circuit Court of Appeals. Such Findings and evidence support the foregoing summary and short statement of the matter involved as will be demonstrated in the brief."

To be sure the majority opinion of the Tenth Circuit Court of Appeals disposes of the case by deciding the questions of *law* against the petitioners herein; and does

so even upon that view of the facts which is most favorable to petitioners. The decision, by the Tenth Circuit Court of Appeals, of the questions of law in favor of respondents made it unnecessary also to decide the issues of fact as to whether there is an estoppel in our favor. There is substantial dispute as to the facts as can be seen from the references to the record which follow.

If certiorari is granted the issues of fact as well as the issues of law will be opened up. It is submitted that the issues of fact should also have been resolved against petitioners and, therefore, this petition should be denied.

Petitioners misstate the findings and the evidence in their petition and brief. For example see page 2 of the petition, line 13. Respondents say: "The *city* . . . urged and induced the railroad . . . and promised the railroad that it would proceed forthwith to take the necessary steps to pass an ordinance. . . ."

"The *city* failed to keep its promise."

The "city" did not do anything of the kind. The record shows some *conversations* between the *Mayor* and some railroad officials from which it may be fair to assume that the *Mayor* made a promise of that nature. But nobody else did, and certainly the "city" did not.

The record shows the following:

The railroad's attorney and witness, Mr. Jensen (R. 141), testified that the "Mayor" stated that the street would be closed and the ordinance passed.

The railroad's station agent and witness, Mr. Lawrence (R. 168), testified that the "Mayor" said they would pass the ordinance.

The Mayor denied that he or the commissioners had, at the meeting of February 25th, promised that an ordinance would be passed closing the street (R. 236-237). He said that he and the commissioners told the railroad officials to submit an ordinance and that he and the commissioners would consider "whether or not we wanted to pass it . . . take the matter under advisement." (R. 237)

Commissioner Swapp testified that the promise was to consider the ordinance if the railroad attorney sent it down (R. 377, 386). Swapp testified that he had never at any time made a promise or statement that he would pass an ordinance. (R. 378) Swapp further testified that he had never told Mayor Harding to tell the station agent, Mr. Lawrence, that the railroad might go ahead, and that he had never authorized Mayor Harding to speak for him in anything like that. (R. 382) Swapp testified that the railroad was not authorized to go ahead with the construction. (R. 383).

Commissioner Swapp testified that he had opposed it all the way through. (R. 384) He testified that he told the Mayor and Commission that he could not understand why a company like a railroad would go ahead and build railroad yards and close a street without authority to do so. (R. 384)

He didn't think the street would be closed. (R. 385)

Commissioner McQuire testified (R. 409) as follows: The question of passing an ordinance was discussed at the meeting of February 25. Inasmuch as the railroad was familiar with the drawing of an ordinance of that sort, it was the understanding that they draw one and present it to the city attorney to look over and for the Commission to consider. McQuire did not recall any definite commitment or promise at that meeting.

McQuire testified as follows: (R. 409) "Well, it might be stated at this meeting, the matter of protest had come from employees of the round house; and if I am not mistaken, a cat-walk or some sort of means for the working men residing in the eastern part of the City to walk over to their work or to have an overpass was discussed, but the overpass was ruled out immediately. And some discussion was indulged in concerning a cat-walk that might be constructed if steel, material, could be procured, but the Railroad companies, as I recall it, didn't state definitely that they would construct it. The City Commission, however, at this time, I think, felt that that should be constructed by the Railroad Company."

"Q. Now, was any further discussion that you recall had at that time?

A. I don't recall now anything in addition to the discussion of the closing of the Ninth South Street and Mr. Jensen's preparing an ordinance to be looked over by the attorney and to be taken under consideration and advisement by the Commission.

Q. Has there ever been while you were a Commissioner any ordinance presented or any other motion, resolution, regarding the closing of Ninth South Street?

A. No, I haven't *see* an ordinance to that effect.

Q. Has the Commission as far as you know ever called the City Attorney to draw such an ordinance or to submit one?

A. No.

Q. Have you ever authorized Commissioner Swapp or Mayor Harding to commit you to speak for you in regard to these matters?

A. No.

Q. Have you at any time made any commitment or promise to Mr. Lawrence or any other railroad man that they might proceed with the construction of these tracks and that Ninth South Street would be closed?

A. No, I haven't discussed the matter with any of the railroad officials privately." (R. 410-411)

He testified that he recalled no commitment having been made at any meeting. (R. 412)

There is no evidence in the record of any positive promise, representation or action on the part of the Provo City Officials authorizing the plaintiffs to close Ninth South Street. The record reflects nothing more than negotiations, discussions, correspondence and controversy between plaintiffs and defendants with respect to the closing of Ninth South Street. The evidence does not show that the plaintiffs relied, in building their new yards and closing this public street, on anything more

than their interpretation of the understanding that they could do so drawn from the numerous negotiations had with the defendants about the matter. The record positively shows that the citizens of Provo registered their objections to the closing of Ninth South Street from a time prior to the alleged promises of the City Commission that the street would be closed, and have continued their objections verbally and in writing since that time. There is no evidence that there was bad faith on the part of either plaintiffs or defendants. And, finally, the evidence fails to show that the plaintiffs suffered or will suffer irreparable damage if the street is opened for use by the public.

The reason there is no estoppel in this case is well stated in Elliott on Roads & Streets, 3rd ed., v. 2, sec. 1189:

> "It has been held that non-user is evidence of abandonment, and many of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust. We doubt, however, if the doctrine of some, if not most, of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is

> equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities."

Respondent contends that the facts and circumstances created no equitable estoppel in that: (1) the railroad officials were advised by the city attorney and at all times both the city and railroad officials acted upon the assumption that it was necessary for an ordinance to be enacted vacating the street. The railroad claims that the city officials promised at the meeting of February 25, 1943, to enact an ordinance, but Mr. Bradford and Mr. Lawrence, railroad officials, went to the Provo newspaper and gave the story of the meeting immediately thereafter, in which those railroad officials said that a discussion had taken place and that the commission took the matter under advisement. (Exhibit 21, R. p. 531.)

The Mayor had many telephone conversations with Mr. Lawrence, but does not think he told him the ordinance would be passed in the conversation on April 9, 1943, but even if he did, the Mayor's statement could be construed as not more than a statement that the Mayor would vote for the ordinance when the matter came up, provided the railroad fulfilled the conditions laid down in the beginning.

Certainly, Commissioners Swapp and McQuire never promised anything.

The railroad officials came to the Mayor and city commissioners of Provo with a plan for the construction of new yards, represented the urgency due to the war

effort, and intensified traffic requiring additional freight yard facilities, appealed to their patriotism, requested that Ninth South Street be closed and represented that traffic conditions on University Avenue would be relieved. The city officials studied the problem, were favorably impressed, wanted the new yards in the city if possible, but stated the conditions of closing Ninth South Street to be: (a) The railroad had to eliminate the objections on the part of citizens and workers to the closing thereof; (b) the railroad had to provide access for workers going to and from work; (c) the railroad was to pay the cost of water and power line changeover; (d) the railroad to provide a cutoff to replace Fifth East Street at the point of intersection with Ninth South Street. (See exhibits 23, R. p. 82; 25, 37, R. p. 118); and, (e) the railroad was to get permission from the Public Utilities Commission to close the street. (See Exhibit 67, R. p. 547.)

The railroad has failed to eliminate the objections and to provide access for the workers to and from work.

There is no evidence of a representation or promise which binds Provo City or its citizens, but on the contrary, the record discloses negotiation, discussion, conversation, controversy, and parley which never reached fruition in an agreement or in compliance with the Utah legislative enactments.

(2) There was no reasonable reliance by the railroad. The railroad officials knew that an ordinance had to be passed by the commission before the street could be vacated. Most assuredly, Mr. Bradford's thirty-two years of railroad experience enabled him to deal at arm's length with the city officials concerning this matter. He knew an ordinance was necessary. (See Exhibit 24, R. p. 88.) He knew permission from the Public Service Commission was necessary. He knew that as the matter stood it rested in controversy and not in agreement.

At the meeting of September 28, 1943, heated words were exchanged between Mr. Bradford, the representative of the railroad, and Mayor Harding, each accusing the other of "not treating us fairly." (See Exhibit 67, R. p. 547.)

The plain fact of the matter is that the railroad decided to take a chance and make the improvement without an ordinance. In doing so, they acted at their peril.

The railroad actually commenced work on the new yard before the alleged promises were supposed to have been made. The Mayor's promise is alleged to have been made in a telephone conversation of April 9, 1943. Witness Zanolio testified that the work began March 6 or 7, 1943. (R. p. 180.)

(3) There was no acquiescence on the part of the city officials. The Mayor and Commissioners continued discussion and correspondence with the railroad officials concerning the settlement of the problems involved. The matter never got out of the negotiating stage. (See exhibits 21, R. p. 531; 26, R. p. 533; 30-42, R. pp. 111-124; 51, R. p. 480; 52, R. p. 481; 58, R. p. 541; and 61, R. p. 545; and exhibit B, R. p. 504; H, R. p. 552, inclusive.)

Some reliance in the record is placed by the railroad upon the fact that the city was changing water mains on Ninth South Street on or about the time of these negotiations. No acquiescence by the city in the closing of Ninth South Street can be assumed from this fact. The record is clear that the installation of these mains along Ninth South Street was a separate project. (Witness Jacob, R. p. 301.)

All during the time in question the city officials were insisting upon compliance with the conditions they required to the enactment of an ordinance.

(4) There was no acquiescence on the part of the public which should estop the citizens of Provo. Certainly the public did not stand by and permit the street to be closed without protest. The street was left open until about May 15, 1943, but the public began their protests by petition February 27, 1943, and petitioned again October 23, 1944; and those protests were continued in person and through the local newspaper and by further protest by petition down to and through the time of the trial of this matter. (See exhibits 22, R. p. 532; 64, R. pp. 80 and 91; 53, R. p. 535; 54, R. p. 211; 56; R. p. 537; 57, R. p. 539;

58, R. p. 541; 59, R. p. 542; 60, R. p. 543; 61, R. p. 545; 67, R. p. 547; 68, 70 and 71; R. p. 548; 72, R. p. 549; exhibit G, R. pp. 249 and 368-373; and exhibit H, R. p. 552; R. pp. 427-467.)

(5) The railroad claims it will be irreparably damaged if the street were re-opened.

There is no evidence that such would be the case. The railroad would still be able to use its yards. At most, if the street were re-opened and the crossing made available to the public, the railroad would be required to participate in the employment of watchmen on each side of the Ninth South Street railroad crossing, and to maintain warning devices. There is undisputed evidence that there are other public street grade crossings over more tracks than exist at the Ninth South Street crossing, and at points where the traffic is much greater than on Ninth South Street, where the railroad business is carried on without interference.

CONCLUSION

The Denver & Rio Grande Western Railroad Company closed a public street in Provo City, Utah, barricaded the same with fences and placed across it several new tracks. All of this was done in plain contravention of at least three Utah statutes.

Those three statutes are:

(1) Utah Code Annotated 1943, sec. 15-8-8, which requires a city street to be vacated "by ordinance." Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941).

No ordinance was enacted here.

(2) Utah Code Annotated 1943, sec. 76-4-15, which gives the Public Service Commission *exclusive* power over the manner and terms of installation, use and protection of grade crossings of highways by a railroad; and which forbids the construction of a track across a public street at grade "without the permission of the Commission having first been secured."

No such permission was obtained here.

(3) Utah Code Annotated 1943, sec. 25-10-21, which gives the voters of a city the right to require a referendum upon a proposed ordinance.

Keigley v. Bench, 97 Utah 69, 89 Pac. (2nd) 480, 122 ALR 756.

This statute was enacted by the legislature to enable the citizens of a city to protect themselves against the action of the city commission. The railroad and city officials, where they know strong opposition from citizens exists, cannot deprive the public of its veto upon their proposed action, by closing the grade crossing without an ordinance and preventing the referendum.

The claim of the railroad, and the judgment and decree of the Federal District Court below, was that Provo City officials and the citizens of Provo City were estopped to set up defenses under the foregoing statutes.

That judgment and decree is contrary to the decision law of the State of Utah. Tooele City v. Elkington, 100 Utah 485, 116 Pac. (2nd) 406 (1941); Hall vs. North Ogden City, ... Utah ....., 166 Pac. (2nd) 221.

The Utah Supreme Court follows what is the well recognized rule everywhere, namely, where the statutes prescribe the procedure to be followed in vacating a highway, street or alley, the statutory method is exclusive and must be substantially complied with. Elliott, Roads and Streets, 3rd ed., secs. 1184-1185; McQuillin, Municipal Corporations, 2nd ed. Revised, 1529.

It is difficult to conceive upon what principle an equitable estoppel can be said to apply in this case. The railroad officials knew as a matter of law that Ninth South Street in Provo City belonged to the public and that the city officials can neither directly or indirectly alien the right of way, and that they cannot divert it to a private use. The railroad officials knew that the Utah statutes prescribed the procedures to be followed in vacating a street and that the Supreme Court of Utah had held

a statutory method by ordinance exclusive. They knew that the statutes forbade the construction of a railroad track across a public street at grade without the permission of the commission "having first been secured." As the railroad officials must have possessed this knowledge, and in legal contemplation did possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal. Moreover, the railroad's use of Ninth South Street was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities.

It is respectfully submitted that the petition should be denied.

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